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THE SEVENTH CIRCUIT PREAPPEAL PROGRAM: AN EVALUATION

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May 1982

This publication is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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TABLE OF CONTENTS

I. APPROACH AND OBJECTIVES OF THE PREAPPEAL PROGRAM . . . 1

II. METHODOLOGY AND DESIGN 5

The Mandatory-Conference Segment of the Study . . . 6
The Elective-Conference Segment of the Study 9
The Attorney Survey 11

III. EVIDENCE OF PROGRAM EFFECTS 13

The Mandatory-Conference Segment of the Study . . . 13
The Elective-Conference Segment of the Study 32
The Attorney Survey 34

IV. CONCLUSIONS: BENEFITS IN RELATION TO COSTS 42

APPENDIX A: LETTER SENT TO ATTORNEYS WHOSE CASES WERE ASSIGNED TO GROUP A OR GROUP B 45

APPENDIX B: MEMORANDUM SENT TO ATTORNEYS WHOSE CASES WERE ASSIGNED TO GROUP C, GROUP D, OR GROUP E 49

APPENDIX C: MEMORANDUM AND QUESTIONNAIRES SENT TO ALL ATTORNEYS WHO PARTICIPATED IN THE STUDY 53

APPENDIX D: COSTS AND BENEFITS OF PREHEARING CONFERENCES 69

LIST OF TABLES

1. Assignment of Cases to Groups in the Mandatory-Conference Segment of the Study 7

2. Assignment of Cases to Groups in the Elective-Conference Segment of the Study 10

3. Basis of Eligibility for Mandatory Conference by Group: Percentage of Cases in Each Group with the Given Eligibility Criterion 14

4. Conference Group Characteristics: Percentage of Conferences in Each Conference Group with the Given Characteristic 16

5. Average Number of Routine Motions 18

6. Average Number of Nonroutine Motions 20

7. Average Number of Pages in Appellant's, Appellee's, and Combined Briefs 21

8. Average Number of Pages in Appellant's, Appellee's, and Combined Briefs in Multiple Appeals or Appeals with Multiple Parties 23

9. Average Number of Pages in Appendixes for All Appeals and for Multiple Appeals or Appeals with Multiple Parties 24

10. Mean and Median Elapsed Times (in Days) for Appellate Stages 27

11. Mean and Median Elapsed Times (in Days) from Notice of Appeal to Termination 30

12. Differences in the Disposition of Appeals by Group: Percentage of Each Group Disposed of in Different Ways 32

13. Summary of Findings in the Elective-Conference Segment of the Study: Characteristics of Cases . . . 33

14. Summary of Findings in the Elective-Conference Segment of the Study: Mean and Median Elapsed Times (in Days) for Appellate Stages 34

15. Attorneys' Backgrounds and Related Experience 36

16. Nature of Attorneys' Specific Appellate Experience: Percentage of Attorneys in Each Group Who Had the Appellate Experience 37

17. Informal Contacts of Attorneys: Percentage of Attorneys in Each Group Who Affirmed Conferring with Opposing Counsel 38

18. Identity of Person First Raising Settlement Discussion: Percentage of Attorneys in Each Group 39

19. Attorneys' Reasons for Not Raising the Issue of Settlement: Percentage of Attorneys in Each Group 40

20. Attorney Suggestions for Conference Concentration . . . 41

I. APPROACH AND OBJECTIVES OF THE PREAPPEAL PROGRAM

In 1978, the United States Court of Appeals for the Seventh Circuit conducted a study of the prehearing conference for federal appeals. The court developed a preappeal program based on Federal Rule of Appellate Procedure 33.[1] The program implemented by the court departed in two substantial ways from preappeal programs in other federal and state courts. First, the court evaluated the Seventh Circuit program according to a set of specific expectations that the court believed could justify continuation of the program. Second, the evaluation of the program attempted to compare the effectiveness of prehearing conferences conducted jointly by a circuit judge and a senior staff attorney with the effectiveness of conferences conducted by a senior staff attorney alone.

This report documents the results of this investigation. It

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1. Federal Rule of Appellate Procedure 33 states that

> [t]he court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

is divided into four parts: a summary of the approach and objectives of the preappeal program; a methodological section detailing the evaluation of the program; an examination of the evidence from case files and an attorney survey addressing the effectiveness of the program; and an assessment of the benefits of the program in relation to its costs.

The purpose of the evaluation was to determine whether and to what extent prehearing conferences conducted by a senior staff attorney, or by a senior staff attorney in collaboration with a circuit judge, are effective in reducing the workloads of Seventh Circuit judges. The reduction in workloads was expected to result from a reduction in the length and frequency of submission of materials (for example, motions or briefs) submitted to the court.

The court was unconvinced that staff intervention through prehearing conferences could encourage informal dispute resolution on appeal, an oft-repeated claim of proponents of the preappeal conference. Although the court recognized that such dispute resolution might be encouraged by its program, the court's main objective for the program was to achieve substantial reductions in the workloads of the circuit judges independent of the settlement or withdrawal of appeals.

All civil appeal notices filed from February 1978 through March 1979 (excluding pro se and 28 U.S.C. § 2255 applications) were reviewed by the court's senior staff attorney and sorted into two mutually exclusive categories. The first category con-

tained all appeals in which a prehearing conference was likely to be beneficial. An appeal was placed in this category if it satisfied one or more of the following criteria:

1. The case involved multiple parties
2. The case was a multiple appeal
3. No transcript of the case was needed or a complete transcript was available
4. Favorable settlement possibilities were present
5. The case involved broad public interest or public impact
6. Expeditiousness in the appeal was deemed essential
7. The case raised an issue of appellate jurisdiction.

Appeals identified as satisfying one or more of the eligibility criteria totaled 230.[2] These cases constituted the sample for the "mandatory-conference" segment of the study.

A substantial number of appeals did not satisfy any of the screening criteria; the court did not require a prehearing conference for these cases. However, the court decided to test whether providing attorneys in these cases with the opportunity to hold an elective conference would affect the outcome of the cases. During the period investigated, 420 appeals were designated for the "elective-conference" segment of the study.

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2. All cases were screened by John W. Cooley, in his capacity as senior staff attorney. At the end of this screening phase, Mr. Cooley was appointed United States magistrate for the Northern District of Illinois. His replacement, John Gubbins, conducted the few remaining conferences according to the evaluation plan. (Most of the conferences were conducted by John Cooley, however.)

In summary, two separate investigations of the preappeal program were undertaken. The first examined the effects on the appeal process of a mandatory conference for appeals that were arguably improvable; the second explored the effects of an elective conference for appeals in which the court could not argue that its intervention was likely to be helpful.

II. METHODOLOGY AND DESIGN

In both the mandatory-conference and the elective-conference segments of the evaluation, a control group was designated in order to provide a basis of comparison on the performance measure (reduced workloads of judges) identified by the court in advance of the study.

The cases in both segments of the study were randomly assigned to groups according to a plan used in a previous investigation of appellate procedure. After the cases were screened by the senior staff attorney, their docket numbers were entered in a log (one for the mandatory-conference segment and one for the elective-conference segment). The cases in each of the logs were then randomly assigned to groups by the Research Division of the Federal Judicial Center.[3]

The senior staff attorney dictated memos in every conference case.[4] The conferences lasted from fifteen to forty-five minutes; a typical conference was twenty to thirty minutes in duration. The conferences concentrated on scheduling matters and, when appropriate, accelerating appeals. Attorneys occasionally

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3. See J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration 18-19 (Federal Judicial Center 1977).

4. A collection of these memos is on file with the Center's Research Division; copies are available on request.

resisted efforts by the court to accelerate appeals. Once an agreement was struck, however, the attorneys were reminded of their commitment to the expedited schedule and to the likely dates for oral argument. This commitment was reinforced by Judge Luther M. Swygert in the conferences in which he participated.

The possibility of jurisdictional defects arose at several conferences, and alternative courses of action were explored. These discussions seemed especially valuable to attorneys who were unfamiliar with federal appellate practice; these attorneys were provided with information on circuit rules and requirements for perfecting their appeals.

The possibility of settlement was a frequently raised issue. In nearly all cases, settlement discussions had already occurred prior to the conference. On a few occasions, attorneys were urged to consider settlement, especially in cases in which the matter in controversy was negligible. In no circumstance, however, did the court badger attorneys to settle the dispute or suggest disfavor with the continuation of an appeal.

The senior staff attorney also assisted in coordinating the activities of co-counsel and moderating the adversariness of opposing counsel who were deeply committed to their clients' causes.

The Mandatory-Conference Segment of the Study

In the mandatory-conference part of the investigation, appeals were assigned at random to one of three groups (see table 1).

TABLE 1

ASSIGNMENT OF CASES TO GROUPS IN THE MANDATORY-CONFERENCE SEGMENT OF THE STUDY

Group	Condition	Number of Cases Assigned	Number (and Percentage) of Assigned Cases Analyzed
A	Staff attorney conference	77	70 (90.9%)
B	Staff attorney and circuit judge conference	76	64 (84.2%)
C	Memo (control)	77	65 (84.4%)
All cases		230	199 (86.5%)

Appeals cases assigned to group A were designated for pre-hearing conferences, which were to be conducted by the court's senior staff attorney. The attorneys involved in these cases were notified by letter (see appendix A) of the court's intention to schedule a conference, which was to be held in the United States courthouse if the attorneys were within reasonable traveling distance of the court. If excessive distance or other matters prevented a face-to-face conference, a telephone conference was to be arranged. The letter to the attorneys also listed the conference agenda and actions that counsel should take prior to the conference.

Appeals cases assigned to group B were treated in much the same manner as those in group A, with the exception that Judge Swygert was to be asked to participate in the conferences. The attorneys whose cases were assigned to group B were sent the same

letter that was sent to attorneys in group A, except that it included a notation that informed the attorneys of Judge Swygert's expected participation in the conference (see appendix A).

Prior to the implementation of the preappeal program, attorneys in the Seventh Circuit had not been given any guidance from the court in perfecting their appeals. With implementation of the program, however, the court felt that all attorneys should be made aware of the court's expectations under the Federal Rules of Appellate Procedure and local rules. Therefore, a memorandum was sent to attorneys in group C explaining in detail many of the issues that would have been considered at a conference, had one been held (see appendix B). The memorandum urged counsel to examine jurisdictional issues, transcript preparation, docketing, appearances, brief and appendix preparation, consolidation issues, and the possibility of settlement.

The memorandum to counsel added no appreciable burden to the court's work; the court therefore decided that it was desirable to compare the effectiveness of the conference (groups A and B) with that of the written communication (group C) on the ground that issuing the memorandum was an appropriate base policy for the court to follow and did not need to be justified empirically. Thus, the mandatory-conference part of the preappeal program study tested (1) the efficacy of the conference compared with that of the detailed memorandum to counsel and (2) the efficacy of conferences in which a judge participated compared with that of conferences that were conducted by a staff attorney alone.

Approximately 14 percent of the 230 cases in the mandatory-conference segment of the study were not included in this report because the information on these cases was incomplete. Because the evaluation design called for seventy cases per group, the absence of case information may mask real benefits or suggest effects that may prove to be false. These problems are unlikely, however. The distributions of eligibility criteria for the missing and analyzed cases are similar, which suggests that distortion of the findings is unlikely. Most of the missing cases were among the last to be randomly assigned, although there are fewer missing staff-attorney conference (group A) cases.

This suggests what the evidence indicates: that the cases in group A were handled more expeditiously than the cases in the other groups (groups B and C). Unless the missing cases in groups B and C were resolved with far greater dispatch at the end of the study than they were at the beginning, the absence of such cases would be unlikely to encourage false conclusions concerning the effects of the program. To be sure, the only way to resolve remaining doubts, no matter how small the probabilities, would be to include all randomly assigned cases in the analysis. The evidence at hand provides a reasonably complete impression of the Seventh Circuit program, however.

The Elective-Conference Segment of the Study

The second part of the evaluation concentrated on the appeals that offered no prima facie reason for a prehearing confer-

ence. These cases were randomly divided into two groups (group D and group E; see table 2).

TABLE 2

ASSIGNMENT OF CASES TO GROUPS IN THE ELECTIVE-CONFERENCE SEGMENT OF THE STUDY

Group	Condition	Number of Cases Assigned	Number (and Percentage) of Assigned Cases Analyzed
D	Memo only	209	181 (86.6%)
E	Memo, including invitation to request a conference	211	185 (87.7%)
All cases		420	366 (87.1%)

Approximately 13 percent of the cases in the elective-conference part of the study were not included in this report. However, because no minimum number of elective-conference cases was specified in the evaluation design, the analysis of those cases that were included in the study can proceed without further consideration of their number.

Attorneys in group D received a memorandum identical to the one that was sent to attorneys in group C of the mandatory-conference segment of the study (see appendix B). Attorneys in group E received the same memorandum, except that a paragraph was added informing them that they could request a prehearing conference (see appendix B):

> (7) Any party may request a docketing conference pursuant to Rule 33, Fed. R. App. P., or file a motion to expedite

> the appeal. The conference may serve as a forum for settlement discussions, and for streamlining or otherwise improving the appeal. You may arrange to schedule a conference by contacting the secretary to John W. Cooley, Senior Staff Attorney (312-435-5804) (FTS 8-387-5804).

Thus, the only systematic difference in this second part of the evaluation was that attorneys in half of the appeals were invited to request a conference.

The elective-conference segment of the study also provided a rough check on the criteria employed by the senior staff attorney in screening cases for assignment to mandatory conferences. Recall that appeals that failed to meet any of the criteria were placed in the elective-conference sample. If the criteria were too restrictive, and, more important, if the attorneys in group E, who received the memorandum that included an invitation to request a conference, were following the measures described in the memorandum, one would expect a substantial number of conference requests to be made. (One could not infer that the screening criteria were too liberal from the observation that few attorneys accepted the invitation to confer, however.)

The assumption behind the elective-conference component of the evaluation was that counsel would be in a position equivalent to the court's in determining the potential usefulness of the conference program. It would appear to be a waste of resources to use the conference in every case, when there is nothing in the appeal record to justify the court's intervention.

The Attorney Survey

A survey of attorneys was conducted during the course of the

investigation to reinforce and inform the judgments based on the data derived from case files. All attorneys involved in appeals selected for the mandatory-conference or elective-conference components of the study were asked to respond to a questionnaire that was mailed to them (see appendix C). An unknown proportion of attorneys had only minimal involvement in the appeals included in the study; unfortunately, it was not possible to screen out with consistency the attorneys who lacked the experience in specific cases to answer the survey questions thoughtfully.[5] However, the memorandum accompanying the questionnaire, which was signed by the circuit executive, recommended that if the attorney who received the questionnaire was only minimally involved in the appeal, the attorney should direct the questionnaire to the principal attorney in that office.

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5. There were obvious exceptions to this procedure. United States attorneys and state attorneys general were often listed as counsel, although their participation was likely to be minimal. They were not surveyed.

III. EVIDENCE OF PROGRAM EFFECTS

The Mandatory-Conference Segment of the Study

Table 3 reports the extent to which cases in the mandatory-conference segment of the study satisfied the eligibility criteria formulated by the court and administered by the senior staff attorney in assigning cases to groups. The need for expeditiousness stands out as the single most important criterion used in assigning cases, and the public interest criterion appears to have been used with the least frequency. If the appeals included in the mandatory-conference part of the study satisfied only one criterion each, their distribution across the three groups could be challenged for three of the criteria (had favorable settlement possibilities, involved broad public interest, and expeditiousness deemed essential) because the percentages of cases are more dissimilar than would be expected if they were distributed entirely by chance. Given the intercorrelation of the criteria and their compensating distributions, the unequal frequencies across groups should not be problematic for the overall analysis. Care should be exercised, however, when comparing subsets of unequally distributed appeals.

Do these criteria exhaust the supply of appeals that could benefit from a rule 33 conference? The elective-conference set of appeals provides a possible answer to that question. Recall

TABLE 3

BASIS OF ELIGIBILITY FOR MANDATORY CONFERENCE BY GROUP: PERCENTAGE OF CASES IN EACH GROUP WITH THE GIVEN ELIGIBILITY CRITERION

Eligibility Criterion	All Groups (A + B + C)	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo	Chi-Square (2 df)	p Value
Involved multiple parties	23%	30%	14%	25%	4.7	n.s.
Involved a multiple appeal	21%	26%	22%	14%	3.0	n.s.
No transcript needed or complete transcript available	19%	20%	21%	17%	0.3	n.s.
Had favorable settlement possibilities	18%	27%	14%	12%	5.9	.05
Involved broad public interest	7%	1%	6%	14%	8.0	.02
Expeditiousness deemed essential	57%	50%	70%	51%	6.6	.04
Raised issue of jurisdiction	24%	24%	14%	34%	4.0	n.s.
Number of cases	199	70	64	65		

NOTE: Because appeals usually satisfied several criteria, the column percentages do not sum to 100.

that appeals in this part of the study were assigned to either the group that received the memorandum only (group D) or the group that received the memorandum with an invitation to request a conference (group E). As discussed earlier, if the criteria for assigning cases to mandatory conferences were too restrictive, one might find a substantial number of conference requests made by group E. But as is shown later in the discussion of the elective-conference findings, conferences were requested in only 6 percent of the appeals in group E, which is consistent with the assumption that the mandatory-conference appeals criteria were fairly exhaustive.[6]

The court expected benefits from the conferences in three main areas: reduction in the length and frequency of submission of materials for judicial examination and reduction in case time. Before the cases used to test these objectives are examined, the frequency and character of the conferences should be discussed to determine whether the conferences were implemented properly. Table 4 summarizes the frequency and character of the conferences.

Conferences were held in more than 90 percent of the appeals in both group A and group B. The attrition of 8 percent in group B and 6 percent in group A is attributable to dismissals prior to the scheduling of the conference or prior to the conference it-

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6. This assumes that attorneys who received the court's memorandum that included an invitation to request a conference understood the purpose of the conference and judged that their cases would not benefit from such a meeting.

self. The distribution of face-to-face and telephone conferences is also comparable across groups A and B.

TABLE 4

CONFERENCE GROUP CHARACTERISTICS:
PERCENTAGE OF CONFERENCES IN EACH CONFERENCE GROUP
WITH THE GIVEN CHARACTERISTIC

Characteristic	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference
Conferences held	94% (70)	92% (64)
Of conferences held:		
Face-to-face	36%	41%
By telephone	64% (66)	59% (59)
Judge participation	--	68% (59)

NOTE: Numbers in parentheses indicate number of cases.

Judge Swygert's nonparticipation in over 30 percent of the group B conferences weakens inferences concerning the effects of judge participation in the conference. Comparisons can be made between the group in which Judge Swygert participated and groups A and C only if there is no systematic difference between the subset of group B appeals in which he participated and the subset of group B appeals in which he was absent from the conference.

When the problem of Judge Swygert's nonparticipation in several of the group B conferences was first considered, it seemed

clear that his decision not to participate in these conferences was based on matters independent of the cases set for the conference. Although not reported here, analysis of the group B cases, comparing eligibility criteria in the judge-present and judge-absent subsets, reinforces this preliminary view.[7] The cases are distributed within bounds expected by chance for six of the seven criteria.

Data Analysis

Two different sets of comparisons were conducted on the data in this investigation. The two primary comparisons are between groups A and B, to determine the effects of judge participation,[8] and between the two conference groups combined (A + B) and group C, to discover the effects of the conference per se.

Motions

The court anticipated a reduction in routine motions as a consequence of the prehearing conference. Typical routine motions are (a) stipulations to dismiss under Federal Rule of Appellate Procedure 42(b), (b) stipulations to supplement the

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7. Separate comparisons were conducted with the judge-present subset in order to determine whether the judge's presence had any bearing on conference effects beyond those resulting from his being scheduled to be present. The findings resulting from these comparisons are reported in subsequent footnotes.

8. Comparisons will also be made in subsequent notes between group A and the judge-participation subset of group B (hereafter referred to as the B_1 subset) in order to examine more fully the effects of judge participation.

record, (c) extensions of time to file briefs, and (d) extensions of time to file the transcript. Table 5 presents the average number of routine motions for the different groups.

TABLE 5

AVERAGE NUMBER OF ROUTINE MOTIONS

Comparison	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
A vs. B	1.3 (70)	1.3 (63)		
	$t = 0.10$ n.s.			
A + B vs. C			1.3 (133)	2.4 (65)
			$t = 3.41$ $p < .001$	

NOTE: Numbers in parentheses indicate number of cases.

The data in the first row of table 5 show that motions activity in group A and group B is virtually identical. It can therefore be assumed that no benefit was derived, in terms of a reduction in motions, from the judge's participation in the conferences.[9] A comparison of the motions activity of the conference groups (A + B) with that of group C reveals significant differences, however. The effect of the conference in reducing rou-

9. If the B_1 subset is used in place of B, the average motions activity increases slightly to 1.4. The conclusion--that the judge's participation provides no added benefit--remains unchanged.

tine motions is estimated to be 1.1 ± 0.3 motions per case.[10] Thus, if a reduction of 1.1 motions per case is used as a standard, conducting *conferences in* all eligible appeals filed in a year (approximately 230) would result in a savings of 253 routine motions.

The court also expected a reduction in the number of nonroutine (that is, substantive) motions in appeals cases as a result of the prehearing conferences. Typical nonroutine motions are (a) motions for stays, (b) injunctions, (c) bond pending appeal, (d) the filing of amicus briefs, and (e) the filing of oversize briefs. Table 6 presents the average number of nonroutine motions for each group. There is little difference between groups A and B in nonroutine motions activity. Again, no benefit appears to have been derived from the judge's participation in the prehearing conferences.[11] A comparison of the conference groups (A + B) with group C reveals that there were significantly fewer nonroutine motions in the appeals in which conferences were held; this finding supports the claim that the prehearing conference is effective in reducing the number of nonroutine motions in appeals

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10. In other words, repeated tests would reveal (95 percent of the time) that there would be an average of between 0.8 and 1.4 fewer motions per case. (Whenever we use a range of motions or days in this report, it will refer to the 95 percent confidence interval of the t statistic used to determine whether the difference is statistically significant.)

11. If the B_1 subset is used in place of B, average nonroutine motions activity increases slightly. The conclusion--that the judge's participation provides no added benefit--also remains unchanged.

cases. The estimated reduction in nonroutine motions per case is 0.9 ± 0.2. If the 0.9 reduction is taken as the standard, the conference procedure (with or without judge participation) should result in a yearly reduction of 207 nonroutine motions (assuming approximately 230 appeals are filed in a year).

TABLE 6

AVERAGE NUMBER OF NONROUTINE MOTIONS

Comparison	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
A vs. B	1.0 (70)	0.9 (63)		
	$t = 0.34$ n.s.			
A + B vs. C			0.9 (133)	1.8 (65)
			$t = 2.89$ $p < .005$	

NOTE: Numbers in parentheses indicate number of cases.

Brief Length

Table 7 presents the average number of pages in briefs (appellant's, appellee's, and combined) for the appeals cases in each group. The average number of brief pages for group A is smaller than that for group B for all three measures in table 7, but the differences are too small to rule out chance as the

TABLE 7

AVERAGE NUMBER OF PAGES IN APPELLANT'S, APPELLEE'S, AND COMBINED BRIEFS

Comparison	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
Appellant's brief				
A vs. B	41 (44)	47 (42)		
	t = -0.87 n.s.			
A + B vs. C			44 (86)	45 (40)
			t = -0.16 n.s.	
Appellee's brief				
A vs. B	36 (43)	38 (41)		
	t = -0.43 n.s.			
A + B vs. C			37 (84)	36 (38)
			t = 0.11 n.s.	
Combined briefs				
A vs. B	78 (43)	85 (41)		
	t = -0.73 n.s.			
A + B vs. C			82 (84)	84 (37)
			t = -0.22 n.s.	

NOTE: Numbers in parentheses indicate number of cases.

source of the observed differences.[12] Comparison of the conference groups (A + B) with group C does not reveal significant differences, however; therefore the court's expectation that the conferences would be effective in reducing brief length is not supported.

Cases were selected for the mandatory-conference part of the study based on varying criteria. Some criteria were related to brief reduction; others were not. It is plausible that examining brief lengths of only those appeals selected because they were likely candidates for brief-length reduction might be fruitful.

Table 8 presents the average number of pages in briefs for cases involving multiple appeals or appeals with multiple parties. The larger differences here are encouraging, but because the findings do not pass the threshold of statistical significance, the evidence can only suggest that conferences held with a staff attorney may be more efficacious in reducing the number of briefs in a case than are conferences held jointly with a staff attorney and a judge.[13]

Appendix Length

A clearer impression of the effects of the conference on the appeals process can be found in table 9, which reports the aver-

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12. The differences between groups in brief length increase slightly if B_1 replaces B, but the data do not support the contention that group A differs significantly from group B_1 on this measure.

13. These findings remain unchanged when group B cases are replaced by the B_1 cases in the analysis.

TABLE 8

AVERAGE NUMBER OF PAGES IN APPELLANT'S, APPELLEE'S, AND COMBINED BRIEFS IN MULTIPLE APPEALS OR APPEALS WITH MULTIPLE PARTIES

Comparison	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
Appellant's brief				
A vs. B	48 (25)	61 (15)		
	t = -1.23 n.s.			
A + B vs. C			55 (40)	60 (10)
			t = -0.41 n.s.	
Appellee's brief				
A vs. B	39 (25)	51 (15)		
	t = -1.32 n.s.			
A + B vs. C			45 (40)	51 (11)
			t = -0.61 n.s.	
Combined briefs				
A vs. B	87 (25)	113 (15)		
	t = -1.40 n.s.			
A + B vs. C			100 (40)	113 (10)
			t = -0.66 n.s.	

NOTE: Numbers in parentheses indicate number of cases.

age length of appendixes for each group. The means for groups A and B for all appeals cases are significantly different from each other. For all appeals, the difference between the average length of appendixes for the conference groups (A + B) and the average length of appendixes for the control group (C) approaches, but

TABLE 9

AVERAGE NUMBER OF PAGES IN APPENDIXES FOR ALL APPEALS AND FOR MULTIPLE APPEALS OR APPEALS WITH MULTIPLE PARTIES

Comparison	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
All appeals				
A vs. B	93 (44)	55 (40)		
	$t = 2.00$, $p < .05$			
A + B vs. C			74 (84)	108 (39)
			$t = -1.49$, n.s.	
Multiple appeals or appeals with multiple parties				
A vs. B	104 (25)	55 (14)		
	$t = 1.58$, n.s.			
A + B vs. C			80 (39)	205 (11)
			$t = -2.09$, $p < .05$	

NOTE: Numbers in parentheses indicate number of cases.

does not reach, the level of statistical significance.

The second part of table 9 reports average appendix length for appeals that were selected because they involved either multiple parties or multiple appeals. In these appeals, there is a possibility that a single appendix can be negotiated among the many parties. The differences between groups in length of appendixes for these cases are quite dramatic: The group A mean is almost half the group C mean, and the group B mean is almost half the group A mean. The statistical test permits the conclusion that the conference groups (A + B) submitted appendixes that were significantly shorter than those of the control group (C),[14] but because of the relatively few cases in this subsample (multiple appeals or appeals with multiple parties), one cannot draw that conclusion for the effect of the judge's presence.

The expected reduction in appendix length as a result of the conference procedure is 125 $\pm$ 90 pages per case. This range is unlikely to be very helpful for practical purposes. Its great width is a reflection of the small number of cases that satisfied the multiple parties or multiple appeals screening criteria and also had appendixes filed (fifty cases in all). It would be difficult to extrapolate precisely the benefits of this salutary effect to a larger caseload; but no one can gainsay the importance of the benefits in this subset of appeals.

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14. No additional benefits in terms of appendix length are derived from an analysis of the B_1 subset in lieu of group B cases.

Elapsed Time

The court expected the conference procedure to reduce the elapsed time of appeals. This reduction would be achieved by the parties' agreement to a schedule proposed by the senior staff attorney at the conference. Each group's mean and median elapsed times for the five stages in the appeals process are shown in table 10.

A quick examination of the table reveals little difference between groups at the notice-to-docket stage. This was expected because the conference order would normally address matters only after appeals had been docketed. The next two stages (docket to record and record to appellant's brief) suggest counterintuitive processes. Group B's median and mean elapsed times for these stages were greater than those of group A. The differences approach the significance threshold in the latter and surpass it in the former. These findings suggest that the attention given to scheduling the transmittal of the record in joint conferences may have required more time than it did in conferences in which a judge did not participate.

The most striking finding in the table is the dramatic reduction in the elapsed time from the filing of the appellant's brief to argument or submission that occurs as a result of the conferences. It is obvious that the conferences had a powerful effect on the expediting of appeals at this stage of the process.

The expected benefits resulting from a judge's participation

TABLE 10

MEAN AND MEDIAN ELAPSED TIMES (IN DAYS)
FOR APPELLATE STAGES

Appellate Stage	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
Notice to docket				
Number	70	64	134	64
Median	17	18	18	17
Mean	19	21	20	18
	t = -0.45, n.s.		t = 0.88, n.s.	
Docket to record				
Number	26	28	54	27
Median	30	45	35	38
Mean	56	77	59	49
	t = -2.23, p < .02		t = 0.75, n.s.	
Record to appellant's brief				
Number	18	10	28	16
Median	34	50	38	23
Mean	38	55	44	33
	t = -1.28, n.s.		t = 1.31, n.s.	
Appellant's brief to argument or submission				
Number	42	39	80	35
Median	76	81	79	157
Mean	96	86	91	148
	t = 1.18, n.s.		t = -4.87, p < .001	
Argument or submission to termination				
Number	43	41	84	39
Median	69	59	66	71
Mean	77	77	77	79
	t = 0.01, n.s.		t = -0.13, n.s.	

NOTE: Although the table reports both mean and median times, the statistical test compares only the means.

in the conference are not supported by the findings: Group B's mean elapsed times are greater than group A's for the first three stages, and although they are equal to or less than group A's for the last two stages, in these latter stages the differences do not pass the significance threshold.

But the conferences taken as a whole have a dramatic bearing on the expeditiousness of appeals. How much of the reduction in elapsed time for the appeals process can be attributed to the conferences? Conferences appear to reduce the time required for appeals by between 47 and 67 days. The improvement results from the setting of the argument calendar during the conference. In those cases in which any agreement on scheduling was reached at the conference, an order that often recommended a particular week for oral argument was issued. The circuit executive would reserve slots for these cases when he prepared the calendar. In the remaining cases, for which a date for oral argument was not recommended, the assignment to the calendar would occur upon the filing of the appellant's brief. Again, the conference order would operate to assure the filing of the remaining briefs on schedule. In the control group cases, however, calendaring did not occur until briefing was completed. Thus, the conference enabled the early calendaring of appeals by holding places in advance or by increasing the predictability of ready cases at the time that the appellant's brief was filed.

An examination of appeals in the mandatory-conference group satisfying the expediting criterion reveals the same patterns re-

ported for all the cases, although the differences in the subset are slightly larger.

The effects of the conference can also be examined from another perspective. Table 11 reports the mean and median elapsed times from notice of appeal to termination for each group. The first row of means in table 11 shows that for all appeals, the group B mean elapsed time from notice of appeal to termination is greater than the group A time, but the difference is within the range expected by chance. Group C's mean elapsed time for all appeals is significantly greater than that of the conference groups (A + B). The estimated reduction in mean elapsed time for all appeals as a result of the conference is 43 $\pm$ 37 days.

This expeditiousness is attributable largely to reductions in appeals that run the gamut of the appellate process and, to a lesser extent, to appeals that terminate short of decision on the merits. The second row of means in table 11 reveals a significant difference between the mean elapsed time for appeals decided on the merits in the conference groups (A + B) and the mean elapsed time for the control group (C). The estimated reduction in elapsed time for these appeals as a result of the conference is 75 $\pm$ 37 days.

The findings are more equivocal for appeals that are not decided on the merits. The average elapsed time from notice of appeal to termination in the conference groups (A + B) is significantly different from the average time in the control group (C), but the median values for each group are not significantly

different from each other. Thus, the expeditiousness achieved by the conference cases should be attributed to the substantial gains in appeals that are decided on the merits.

TABLE 11

MEAN AND MEDIAN ELAPSED TIMES (IN DAYS) FROM NOTICE OF APPEAL TO TERMINATION

Appeals	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Groups A + B: Conference	Group C: Memo
All appeals				
Number	70	62	132	63
Median	165	177	175	248
Mean	185	195	189	232
	t = -0.47, n.s.		t = -2.26, p < .01	
All appeals decided on the merits				
Number	41	39	80	34
Median	238	248	238	323
Mean	257	256	256	331
	t = 0.08, n.s.		t = -3.87, p < .001	
All appeals not decided on the merits				
Number	29	23	52	29
Median	69	83	77	80
Mean	82	92	86	117
	t = -0.87, n.s.		t = -2.26, p < .01	

NOTE: Although the table reports both mean and median times, the statistical test compares only the means.

Manner of Disposition

The court chose not to follow the path taken by other appeals courts in the encouragement of settlements. Nevertheless,

the conference may have benignly fostered such an outcome. Table 12 reports the manner of disposition for appeals in the mandatory-conference segment of the study.

The proportion of appeals settled, withdrawn, or dismissed for failure to prosecute is virtually identical across the three groups; yet the proportion of appeals decided on the merits is greater for the conference groups than it is for the control group. Although the differences are still within the bounds of random variation, the speculation that holding prehearing conferences encourages merits litigation cannot be avoided.[15] The final row of table 12 may provide an explanation for this curious anomaly. There were fewer dismissals for lack of jurisdiction in the conference groups than there were in the control group. A review of the case files suggests that an appeal lacking jurisdictional prerequisites (for example, Federal Rule of Civil Procedure 54(b) order) is held in abeyance by conference action until the condition is fulfilled. Then the appeal proceeds on the merits. In the control group, the only legitimate action is a motion to dismiss for lack of jurisdiction, which is granted in

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15. Substituting the B_1 subset for group B makes this observation more pronounced, although still within the bounds expected by chance:

Decided on the merits =	75%
Settled, withdrawn, or dismissed for failure to prosecute =	25%
Dismissed for lack of jurisdiction =	0%
Number of cases =	40

the absence of a rule 54(b) order. The appellant returns to the district judge for the order, and then a new appeal is docketed. In short, the prehearing conference may act as a holding pen for appeals until initial jurisdiction is resolved. The gains for litigants from this approach are obvious.

TABLE 12

DIFFERENCES IN THE DISPOSITION OF APPEALS BY GROUP: PERCENTAGE OF EACH GROUP DISPOSED OF IN DIFFERENT WAYS

Disposition	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo
Decided on the merits	59%	64%	52%
Settled, withdrawn, or dismissed for failure to prosecute	34%	34%	35%
Dismissed for lack of jurisdiction	7%	2%	12%
Number of cases	70	64	65

The Elective-Conference Segment of the Study

As explained earlier, cases that did not satisfy any of the seven criteria for mandatory conferences were placed in a separate pool and randomly divided into two groups. One group (group D) received the same memorandum received by group C of the mandatory-conference part of the study; the other group (group E) received a nearly identical memorandum, with the addition of a

paragraph that informed the attorneys that they could request a prehearing conference.

Tables 13 and 14 summarize the findings for the elective-conference segment of the study. Conferences were requested in only 6 percent of the appeals in group E; this suggests that the court's initial screening was nearly exhaustive. In light of this finding--that few attorneys in group E requested and attended prehearing conferences--it is not surprising that groups D and E do not differ significantly on the various measures identified in tables 13 and 14: percentage of cases in which conferences were held, average number of motions, average number of

TABLE 13

SUMMARY OF FINDINGS IN THE ELECTIVE-CONFERENCE SEGMENT OF THE STUDY: CHARACTERISTICS OF CASES

Characteristic	Group D: Memo	Group E: Memo with Invitation
Number of cases assigned to groups	181	185
Percentage of cases in which conferences held	--	6%
Average number of motions		
Routine motions	2.0	2.0
Nonroutine motions	0.8	0.9
Average number of pages in briefs		
Appellant's brief	35	46
Appellee's brief	31	28
Combined	67	76
Average number of pages in appendixes	57	67

pages in briefs and appendixes, and mean and median elapsed times for appellate stages.

Group D tended to produce shorter briefs and take less time for some stages than did group E, but none of the differences reached the level of statistical significance. Overall, the pre-appeal conference program in the Seventh Circuit has demonstrated significant effects for many of the court's expectations.

TABLE 14

SUMMARY OF FINDINGS IN THE ELECTIVE-CONFERENCE SEGMENT OF THE STUDY: MEAN AND MEDIAN ELAPSED TIMES (IN DAYS) FOR APPELLATE STAGES

	Group D: Memo		Group E: Memo with Invitation	
Appellate Stage	Mean	Median	Mean	Median
Notice to docket	18	15	19	15
Docket to record	68	33	72	43
Record to appellant's brief	60	42	53	34
Appellant's brief to argument	166	165	151	142
Argument to termination	55	38	74	51
Notice to termination	247	251	269	267

The Attorney Survey

As noted earlier, all of the attorneys who participated in the study were surveyed by mail to reinforce the study data and to obtain their views of the procedure. This approach--surveying all attorneys--tends to diminish the response rate of the survey

by inflating the number of those surveyed. Attorneys would occasionally return their surveys without completing them, indicating only that their involvement was slight.[16] The overall response rate of the survey was 59 percent. Under ordinary survey circumstances, this rate raises doubt as to the representativene: of the sample. But the "shotgun" approach used in this survey tends to depress the "true" response rate for knowledgeable attorneys.

Even if the true rate for knowledgeable attorneys were closer to 70 percent, doubts could still be raised as to the representativeness of the respondents. A comparison of characteristics of attorneys in the responding and nonresponding groups would have helped resolve such doubts as might arise, but because of the limited purpose of the survey, badgering nonresponding attorneys in order to buttress the claim of representativeness did not appear to be justified. The emphasis of the evaluation was on case-related hypotheses. The attorney survey, although informative, was not essential to the central components of the investigation. The survey evidence should be examined with this limited purpose in mind. Tests of statistical significance were excluded to emphasize the nondispositive character of this evidence.

Table 15 reports information on the backgrounds of attorneys in groups A, B, and C and the attorneys' related experience in

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16. Respondents returned the surveys to the evaluator rather than the court to assure that the court's promise of anonymity would be preserved.

the use of rule 33 conferences. The data in the table should be examined to satisfy a concern that the groups of attorneys were comparable. With but one exception, the backgrounds and prior experience of these groups of respondents are virtually identical.

TABLE 15

ATTORNEYS' BACKGROUNDS AND RELATED EXPERIENCE

Background and Experience	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo
Mean percentage of legal work spent in federal appellate practice	15% (103)	13% (72)	15% (124)
Mean number of years of practice in the Seventh Circuit	12 (104)	10 (72)	10 (123)
Mean number of previous conferences in the Seventh Circuit	1.5 (104)	1.6 (71)	1.6 (122)
Percentage affirming previous conference experience outside Seventh Circuit	25% (107)	27% (75)	24% (128)
Mean number of conference appearances in federal court	2 (22)	2 (14)	2 (21)
Mean number of conference appearances in state appellate court	4 (11)	2 (10)	1 (12)

NOTE: Numbers in parentheses indicate number of attorneys.

Table 16 reports the nature of attorneys' specific experience in appeals cases. The data in the table reveal a striking similarity among the three groups of attorneys in court-related experience in specific Seventh Circuit cases.

TABLE 16

NATURE OF ATTORNEYS' SPECIFIC APPELLATE EXPERIENCE: PERCENTAGE OF ATTORNEYS IN EACH GROUP WHO HAD THE APPELLATE EXPERIENCE

Experience	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo
Preparation of briefs	88% (94)	84% (62)	85% (106)
Presentation of oral arguments	65% (81)	62% (55)	63% (86)
Other participation	61% (38)	62% (29)	61% (43)

NOTE: Numbers in parentheses indicate number of attorneys.

Table 17 explores the experience of the respondents outside the traditional forms of appellate practice. Two observations are warranted from this table. First, attorneys in the joint conference group (staff attorney and circuit judge) explored settlement with substantially greater frequency than did attorneys in either group A or group C. Second, more attorneys in the staff-attorney conference group met with their adversaries for purposes other than settlement or issue discussion than did at-

torneys in the other groups. At the least, there is a substantial amount of contact between adversaries on appeal.

TABLE 17

INFORMAL CONTACTS OF ATTORNEYS: PERCENTAGE OF ATTORNEYS IN EACH GROUP WHO AFFIRMED CONFERRING WITH OPPOSING COUNSEL

Contact	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo
To explore settlement	35% (104)	55% (73)	33% (122)
To limit or otherwise narrow issues	16% (90)	22% (56)	16% (108)
For some other purpose	62% (90)	46% (56)	38% (108)

NOTE: Numbers in parentheses indicate number of attorneys.

An assertion frequently made in discussions of the use of the preappeal conference to foster settlement is that a third party is necessary to raise the issue of settlement because the parties themselves will not raise it, fearing that it would appear to be an innuendo of the weakness of their position. Table 18 offers some evidence for this common assumption.

More than half of the respondents identified themselves as the initiators of settlement discussion, casting doubt on the "innuendo-of-weakness" assertion. Furthermore, if the higher frequency of settlement discussions in group B (see table 17) was a result of the conference, the percentage of attorneys in group

TABLE 18

IDENTITY OF PERSON FIRST RAISING SETTLEMENT DISCUSSION: PERCENTAGE OF ATTORNEYS IN EACH GROUP

Person	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo
Respondent	54%	63%	58%
Other counsel	32%	26%	33%
Other party	14%	11%	8%
Number of respondents	37	37	40

B who identified other parties as the source of that discussion should have been higher than the percentage of attorneys in group A or group C who did so. This expectation is not fully confirmed by the data. Attributing the greater frequency of settlement discussions in group B to the joint conference is not fully warranted.

In an effort to determine whether it would be fruitful to place greater emphasis on settlement discussions, we asked attorneys who indicated that settlement discussions were not held to respond to the following question: "Why did you not raise the subject of settlement with opposing counsel?" The answers are summarized in table 19. The extremes are illuminating. At one end, settlement was not pursued because respondents felt that it was impossible. At the other end, the innuendo-of-weakness claim was rarely offered as the reason for not entering settlement discussions.

TABLE 19

ATTORNEYS' REASONS FOR NOT RAISING THE ISSUE OF SETTLEMENT: PERCENTAGE OF ATTORNEYS IN EACH GROUP

Reason	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference	Group C: Memo
Client instructed against it	3%	6%	8%
Believed settlement to be impossible	41%	38%	43%
Case concerned an important issue of law	12%	22%	21%
Money damages were not involved	11%	3%	7%
Raising settlement would indicate to opponent the possible weakness of position on appeal	2%	0%	0%
Other reasons	32%	31%	22%
Number of respondents	66	41	73

The survey was also used to gain feedback from the attorneys on the utility of the conference. Of the respondents in groups A and B, 87 percent indicated that they would request a conference if they were starting their appeals anew.

Table 20 provides guidance on the emphasis to be given to the conference agenda. Simplification and acceleration lead the list of preferences of respondents with specific experience in

TABLE 20

ATTORNEY SUGGESTIONS FOR CONFERENCE CONCENTRATION

Conference Conceivably Could Have:	Group A: Staff Attorney Conference	Group B: Staff Attorney and Circuit Judge Conference
Fostered withdrawal	10%	11%
Fostered settlement	12%	15%
Simplified the process	31%	32%
Accelerated the process	36%	34%
Other	12%	9%
Number of respondents	78	47

the Seventh Circuit program. A third to a half as many respondents urged emphasis on withdrawal or settlement.

The general impression created from the survey findings and the additional comments provided by respondents is that the conference is regarded as a useful device, aimed at the right concerns, and conducted efficiently by a well-qualified attorney who earned much praise and no hostility from his fellow attorneys. Praise for the conference was a common feature; criticism of any sort was the exception. In sum, the conference is highly regarded by attorneys who are familiar with it. Belief in the appropriateness of procedural innovation is no substitute for proof, however. In the final chapter of this report, the expectations for the program are weighed against its results.

IV. CONCLUSIONS: BENEFITS IN RELATION TO COSTS

When the evaluation of the preappeal program was negotiated, the court was asked to identify and justify the minimum improvements that would have to occur in order to continue the program. Each measure was considered independently of every other in these calculations, although it was possible for modest improvements to be realized on some measures, which would nevertheless cumulate to substantial benefits without being dispositive on any one ground. The court's argument speaks for itself. Relevant sections of it are reproduced as appendix D.

The effects of the Seventh Circuit program are fairly clear. The prehearing conference had a significant effect in reducing the number of motions--both routine and nonroutine--that judges had to hear. The conference did not appear to have a significant effect on the length of briefs. It did, however, result in significantly shorter appendixes in cases with multiple parties or multiple appeals. There was also a significant reduction in elapsed time from the filing of the appellant's brief to argument as a result of the conference, although this reduction may have been due to the staff attorney's reserving a hearing date at the conclusion of the conference. There was also, consequently, a significant reduction in the elapsed time from filing the notice of appeal to termination. There were no significant differences

between the groups in the rates of settlement of appeals.

There were no situations in which having the circuit judge either scheduled or actually present at the conference changed significantly any of the results found for the conference group in which only the staff attorney participated.

For the reduction of nonroutine motions, the study evidence seems to satisfy the court's minimum expectations. The salutary effects on routine motions and expeditiousness increase the benefits without additional cost. Although other goals were not realized in full, the benefits of the program appear to outweigh the costs, and, thus, it is recommended that the program be continued.

APPENDIX A:

LETTER SENT TO ATTORNEYS WHOSE CASES WERE ASSIGNED TO GROUP A OR GROUP B

Dear :

A notice of appeal has been filed on _____ by counsel for _____. Pursuant to Fed. R. App. P. 33, I will conduct a [telephonic] docketing conference on _____ with counsel for all parties to this appeal.[*]

The purposes of the conference are:

(1) to discuss the possibility of settlement of this appeal;
(2) to inquire as to whether this court has jurisdiction of the appeal;
(3) to work out a schedule for filing of the record with any necessary transcript and to ensure that the record and transcripts are ordered;
(4) to work out a schedule for the filing of the briefs on this appeal; and
(5) to give parties an estimate as to when this court will hear oral argument in the appeal.

If you will not be available for the conference, will you please call and inform my secretary that you will not be available at the scheduled time (312/435-5804). I should receive notice of your unavailability at least one day prior to the [telephone] conference. My secretary will then reschedule a new date for the telephonic conference by notifying each of the parties.

If you are not going to be counsel for the appeal or if your client will not be a party to the appeal, please immediately notify my office by telephone.

Prior to the conference it is expected that you will contact opposing counsel concerning the possibility of settlement.

Counsel for the appellant should be prepared at the conference after having talked to the court reporter to give the date

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*The letter to attorneys in group A included this sentence. The letter to attorneys in group B substituted the following sentence for the one given above: "Pursuant to Fed. R. App. P. 33, Judge Luther M. Swygert and I will jointly conduct a [telephonic] docketing conference on _____ with counsel for all parties to this appeal."

by which necessary transcripts will be prepared and filed. Counsel should also be prepared to file a stipulation or a designation of the record with the district court clerk pursuant to Circuit Rule 4(a).

[USE FOLLOWING PARAGRAPH ONLY FOR PERSONAL CONFERENCES]

On the scheduled date, please come to the Clerk's Office on the 27th floor of the Everett Dirksen Federal Building and sign in a few minutes prior to the scheduled time for conference. Then proceed to the attorney's waiting room and make yourself comfortable until your case is called.

It is hoped that through these conferences we will work out a schedule which meets the individual needs of the clients, the counsel, and the court.

Thank you for your cooperation.

Sincerely,

Jchn W. Cooley

APPENDIX B:

MEMORANDUM SENT TO ATTORNEYS WHOSE CASES WERE ASSIGNED TO GROUP C, GROUP D, OR GROUP E

MEMORANDUM TO COUNSEL

This appeal was docketed on the date indicated on the enclosed "APPEARANCE FORM." Counsel are requested to take the following measures to assist the court in minimizing judicial and administrative workload, and in reducing appellate costs and appeal processing time:

(1) All counsel should carefully examine whether this court has jurisdiction. (See Rules 3 and 4 of the Federal Rules of Appellate Procedure; Rules 54(b) and 58, Federal Rules of Civil Procedure; 28 U.S.C. Sections 1291 and 1292).

(2) Unless already accomplished, appellant's counsel should order transcript, if appropriate, and ensure that the transcript is filed in this Court within 40 days of the filing of the notice of appeal. Unless already accomplished, the appellant must immediately pay the required $50.00 docketing fee to the Clerk of the Court (unless proceeding in forma pauperis). (Cir. R. 26.) All counsel should file written appearances with the Clerk within 10 days after the appeal is docketed. (Cir. R. 5.) Additionally, please read carefully the notices on the bottom of the "APPEARANCE FORM."

(3) Unless otherwise ordered, appellant should file his brief within 40 days after docketing. The appellee then has 30 days to file his brief and appellant has 14 more days to file the optional reply brief. (Rule 31, Fed. R. App. P.) Only 15 copies of the brief must be filed and the briefs may be photocopied. (Cir. R. 9(g) and Rule 28(g), Fed. R. App. P.)

(4) Briefs are not required to be accompanied by a full appendix, but the appellant must submit, either bound with his brief or as a separate document, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court or administrative agency upon the rendering of that judgment or order. It is preferred but not required that the appendix also include any other short excerpts from the record, such as essential portions of the pleading or charge, disputed provisions of a contract, pertinent patent drawings of pictures, or brief portions of the transcript, that are important to a consideration of the issues raised on appeal. In lieu of an appellant's appendix, the parties may file a stipulated joint appendix or proceed in accordance with paragraphs (a) and (b) or paragraph (c) of Rule 30, Fed. R. App. P.

Costs for a lengthy appendix will not be awarded. (See Cir. R. 12.)

(5) In cases involving multiple appeals or multiple parties, counsel should move to consolidate the appeals and should cooperate to avoid repetition through joint and adopted statements of facts and arguments.

(6) All counsel are requested to talk to their clients about settlement and make a good faith effort to settle the appeal.[*]

Thank you very much for your cooperation.

Thomas F. Strubbe

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*The memorandum sent to attorneys in group E included the following additional paragraph:

(7) Any party may request a docketing conference pursuant to Rule 33, Fed. R. App. P., or file a motion to expedite the appeal. The conference may serve as a forum for settlement discussions, and for streamlining or otherwise improving the appeal. You may arrange to schedule a conference by contacting the secretary to John W. Cooley, Senior Staff Attorney (312-435-5804) (FTS 8-387-5804).

APPENDIX C:

MEMORANDUM AND QUESTIONNAIRES SENT TO ALL ATTORNEYS WHO PARTICIPATED IN THE STUDY

MEMORANDUM TO COUNSEL

The United States Court of Appeals for the Seventh Circuit has recently implemented a new docketing program designed to improve the efficiency of the appellate process. Your appeal is one of several hundred cases being studied by the court staff and a professional consultant to evaluate the program's effectiveness.

One component of this evaluation is a survey of attorneys with experience in the Seventh Circuit since the implementation of the program. The purpose of the survey is to learn the views of appellate practitioners in order to assess the articulated goals of the program against actual experience.

In order to assist our evaluation, would you take a few minutes to complete the enclosed questionnaire and return it to the consultant in the franked, self-addressed envelope within ten days. (If you did not participate in this appeal, please give the questionnaire to appropriate counsel for completion.)

Please be assured that your answers to the questions will be used only for statistical purposes and will, of course, be treated confidentially. The numerical designations appearing next to the questions throughout the questionnaire are there only to assist us in rapidly tabulating the data.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

Collins T. Fitzpatrick

ATTORNEY QUESTIONNAIRE: FORM 1
(Sent to attorneys who participated in the conference)

1. What percentage of your legal work is spent in federal appellate practice? . . . . . _____% 8-9/9

2. How many years have you practiced law in the Seventh Circuit? (Include federal district court experience) . . . . . _____years 10-11/9

3. In how many docketing conferences have you previously participated in this court? . . . . . _____conferences 12-13/9

PLEASE ANSWER THE REMAINING QUESTIONS IN THIS SURVEY BASED ON YOUR EXPERIENCE IN:

_____ v. _____

Docket number: _____ 14-19/9

4. At the time the notice of appeal was filed in this case, had you previously participated in docketing or preargument conferences in other appellate courts? (CIRCLE ONE)

Yes	No	
0	1	20/2

4A. If you answered YES, which appellate court(s) and approximately how many times in each?

Federal (Please specify)	Number of times	
_____	_____	21/9
_____	_____	22/9
State (Please specify)		
_____	_____	23/9
_____	_____	24/9

5. You were counsel for: (CIRCLE THE NUMBER IN EACH COLUMN INDICATING THE APPROPRIATE RESPONSE)

Plaintiff . . .	01	Appellant	07
Defendant . . .	02	Appellee	08
Petitioner . .	03	Cross-appellant .	09
Respondent . .	04	Cross-appellee .	10
Intervenor . .	05	Other	11
Other	06		

25-28/9

6. What was your participation in this appeal? (CIRCLE THE NUMBER INDICATING YOUR ANSWER ON EACH LINE)

		Yes	No	
6A.	Preparation of briefs	0	1	29/2
6B.	Oral argument	0	1	30/2
6C.	Other participation . . . . . (PLEASE SPECIFY BELOW)	0	1	31/2

_____

7. Did you confer with your adversary during the course of this appeal? (CIRCLE THE NUMBER INDICATING YOUR ANSWER ON EACH LINE)

		Yes	No	
7A.	To explore settlement possibilities? . .	0	1	32/2
7B.	To limit or otherwise narrow issues? . .	0	1	33/2
7C.	For some other purpose?	0	1	34/2

7D. If you answered YES to Question 7A, at what stage of the appellate proceedings did settlement discussions begin?

Before the notice of appeal was filed . . . 1

Before record filed 2

Before docketing conference 3

Before appellant's brief filed 4

Before appellee's brief filed 5

Before oral argument 6

After oral argument 7 35/9

7E. If you answered YES to Question 7A, which counsel first broached the subject of settlement?

Myself 1

Counsel for _____ 2

Other _____ 3 36/9

7F. If your answer to Question 7A was NO, why did you not raise the subject of settlement with opposing counsel? (CIRCLE THE NUMBER CORRESPONDING TO THE MOST IMPORTANT REASON)

My client instructed me against it 1

I believed settlement to be impossible . . 2

The case concerned an important issue of law 3

Money damages were not involved 4

Raising settlement would indicate to my opponent the possible weakness of my position on appeal 5

Other _____ 6 37/9

8. In the docketing conference held in this case, which of the items listed below were not on the docketing conference agenda but should have been included? (CIRCLE AS MANY ANSWERS AS MAY APPLY)

Settlement possibilities	01	Consolidation of appeals	07
Appellate jurisdiction	02	Joint briefs; adoption of facts and arguments	08
Issue simplification and elimination . . .	03	General court procedures	09
Record filing schedule	04	Other	10
Briefing and oral argument	05	No others	11
Expediting appeal . .	06		

38-47/9

8A. How could the conference have been improved so as to make it more helpful?

_____

_____

_____

8B. What were the drawbacks, if any, with the conference?

_____

_____

_____

9. Did this appeal terminate prior to oral argument? (CIRCLE ONE)

Yes	No	
0	1	48/2

9A. If you answered YES, at what stage of the appellate proceedings? (CIRCLE THE NUMBER CORRESPONDING TO THE EARLIEST STAGE)

Before record filed 1

Before the docketing conference 2

Before appellant's brief filed 3

Before appellee's brief filed 4

Before oral argument 5 49/9

9B. If you answered YES to Question 9, what was the reason for termination? (CIRCLE THE APPROPRIATE NUMBER)

Settlement (quid pro quo) 1

Abandonment (i.e., withdrawal without settlement 2

Lack of jurisdiction 3

Other (Please specify): _____

_____ 4 50/9

10. If you were starting the case anew, would you request this court to arrange a docketing conference? (CIRCLE ONE)

Yes	No	
0	1	51/2

10A. If you answered YES, please select the most appropriate response. (CIRCLE THE APPROPRIATE NUMBER)

The conference conceivably could have:

Fostered withdrawal of the appeal without settlement 1

Fostered settlement of the appeal 2

Simplified the appellate process 3

Accelerated the appellate process 4

Other (Please specify): _____

_____ 5 52/9

10B. If you answered NO to Question 10, please explain:

_____

_____

_____

11. Please estimate the total attorney hours spent in this appeal on behalf of your client. Please calculate your estimate from the filing of the notice of appeal.

_____HOURS 53-55/9

12. What cost was incurred by your client after the notice of appeal was filed for the preparation of the district court transcript? IF NO COST WAS INCURRED, ENTER 0.

$_____ 56-59/9

13. What cost was incurred by your client to file briefs and appendices in this appeal (printing and photocopying expenses only)? IF NO COST WAS INCURRED, ENTER 0.

$_____ 60-63/9

COMMENTS

If you have any additional comments about the court's docketing procedures, including the docketing conference program, or about this questionnaire, please enter them below.

THANK YOU VERY MUCH FOR THE TIME AND EFFORT YOU HAVE GIVEN TO THIS SURVEY.

ATTORNEY QUESTIONNAIRE: FORM 2
(Sent to attorneys who did not participate in the conference)

1. What percentage of your legal work is spent in federal appellate practice? . . . . . _____% 8-9/9

2. How many years have you practiced law in the Seventh Circuit? (Include federal district court experience) . . . . . _____years 10-11/9

3. In how many docketing conferences have you previously participated in this court? . . . . . _____conferences 12-13/9

PLEASE ANSWER THE REMAINING QUESTIONS IN THIS SURVEY BASED ON YOUR EXPERIENCE IN:

_____ v. _____

Docket number: _____ 14-19/9

4. At the time the notice of appeal was filed in this case, had you previously participated in docketing or preargument conferences in other appellate courts? (CIRCLE ONE)

Yes	No	
0	1	20/2

4A. If you answered YES, which appellate court(s) and approximately how many times in each?

Federal (Please specify)	Number of times	
_____	_____	21/9
_____	_____	22/9
State (Please specify)		
_____	_____	23/9
_____	_____	24/9

5. You were counsel for: (CIRCLE THE NUMBER IN EACH COLUMN INDICATING THE APPROPRIATE RESPONSE)

Plaintiff . . .	01	Appellant	07
Defendant . . .	02	Appellee	08
Petitioner . .	03	Cross-appellant .	09
Respondent . .	04	Cross-appellee .	10
Intervenor . .	05	Other	11
Other	06		

25-28/9

6. What was your participation in this appeal? (CIRCLE THE NUMBER INDICATING YOUR ANSWER ON EACH LINE)

		Yes	No	
6A.	Preparation of briefs	0	1	29/2
6B.	Oral argument	0	1	30/2
6C.	Other participation . . . . . (PLEASE SPECIFY BELOW)	0	1	31/2

_____

7. Did you confer with your adversary during the course of this appeal? (CIRCLE THE NUMBER INDICATING YOUR ANSWER ON EACH LINE)

		Yes	No	
7A.	To explore settlement possibilities? . .	0	1	32/2
7B.	To limit or otherwise narrow issues? . .	0	1	33/2
7C.	For some other purpose?	0	1	34/2

7D. If you answered YES to Question 7A, at what stage of the appellate proceedings did settlement discussions begin?

Before the notice of appeal was filed . . . 1

Before record filed 2

Before docketing conference 3

Before appellant's brief filed 4

Before appellee's brief filed 5

Before oral argument 6

After oral argument 7 35/9

7E. If you answered YES to Question 7A, which counsel first broached the subject of settlement?

Myself 1

Counsel for _____ 2

Other _____ 3 36/9

7F. If your answer to Question 7A was NO, why did you not raise the subject of settlement with opposing counsel? (CIRCLE THE NUMBER CORRESPONDING TO THE MOST IMPORTANT REASON)

My client instructed me against it 1

I believed settlement to be impossible . . 2

The case concerned an important issue of law 3

Money damages were not involved 4

Raising settlement would indicate to my opponent the possible weakness of my position on appeal 5

Other _____ 6 37/9

8. Did this appeal terminate prior to oral argument? (CIRCLE ONE)

Yes	No	
0	1	48/2

8A. If you answered YES, at what stage of the appellate proceedings? (CIRCLE THE NUMBER CORRESPONDING TO THE EARLIEST STAGE)

Before record filed 1

Before the docketing conference 2

Before appellant's brief filed 3

Before appellee's brief filed 4

Before oral argument 5 49/9

8B. If you answered YES to Question 8, what was the reason for termination? (CIRCLE THE APPROPRIATE NUMBER)

Settlement (quid pro quo) 1

Abandonment (i.e., withdrawal without settlement 2

Lack of jurisdiction 3

Other (Please specify): _____

_____ 4 50/9

9. Please estimate the total attorney hours spent in this appeal on behalf of your client. Please calculate your estimate from the filing of the notice of appeal.

_____HOURS 53-55/9

10. What cost was incurred by your client after the notice of appeal was filed for the preparation of the district court transcript? IF NO COST WAS INCURRED, ENTER 0.

$_____ 56-59/9

11. What cost was incurred by your client to file briefs and appendices in this appeal (printing and photocopying expenses only)? IF NO COST WAS INCURRED, ENTER 0.

$_____ 60-63/9

COMMENTS

If you have any additional comments about the court's docketing procedures or about this questionnaire, please enter them below.

THANK YOU VERY MUCH FOR THE TIME AND EFFORT YOU HAVE GIVEN TO THIS SURVEY.

APPENDIX D:

COSTS AND BENEFITS OF PREHEARING CONFERENCES

COSTS AND BENEFITS OF PREHEARING CONFERENCES

Terminations

On the average a circuit judge works 45 hours per week, 46 weeks per year. The 6 remaining weeks are used for vacation, sickness, attending circuit conferences, and attending seminars. Forty-six weeks multiplied by 45 hours is 2,070 hours. Subtracting 270 hours for judicial council work, general legal research, and office administration, including the hiring of law clerks and motions work, leaves 1,800 hours for court cases.

A circuit judge participates in an average of 198 cases that are processed through oral argument. He writes one-third (66) of the opinions in those cases. In addition, he decides about 42 cases without oral argument and is responsible for the decision in 14 of them. It takes, roughly, about 3.5 times more work to decide a case after oral argument than it does to decide a case without oral argument. Fourteen unargued cases divided by 3.5 equals 4 cases with oral argument. Thus, 66 plus 4 equals 70 cases per year. The 1,800 hours divided by the 70 cases results in 25.5 hours of total judge time per case decided on the merits after oral argument.

In computing the value of a judge's time in relation to the time of other staff personnel, we have relied on the rough salary figures for the persons most involved in the operation of

an office. A judge's salary is about $125,000, whereas a senior staff attorney's salary is about $50,000. Thus, 1 judge is equivalent to 2.5 senior staff attorneys. The senior staff attorney's salary equals the salary of 2 law clerks. A law clerk' salary is about twice that of a deputy clerk; thus, 1 law clerk is the equivalent of 2 deputy clerks.

We have estimated that, on the average, it takes 20 minutes of a senior staff attorney's time to decide whether to have a conference, to conduct the conference, and to prepare an order.

The central question of the investigation is whether the benefits of the conference outweigh the costs of conducting them To figure out the costs, we have used 20 minutes for a senior staff attorney's time and 15 minutes for a secretary's time. Based on salary, 1 senior staff attorney equals 2.5 secretaries. Assuming that senior staff attorneys spend 500 hours of their time on the conferences, the conferences will prove of value to the court if we save at least 260 hours of judge time. Five hun dred hours of senior staff attorney time converts to 200 hours o judge time, and 375 hours of secretary time equals 60 hours of judge time.

We have assumed that a judge's law clerk spends about twice the amount of time the judge does on a given case. Thus, the total amount of time a law clerk would spend on an average case decided after oral argument would be 51 hours. The 51 hours of law clerk time equals 10.2 hours of judge time. The ratio is 5

law clerks to 1 judge. This means that termination of a case by a senior staff attorney would save the court 25.5 hours of judge time and 51 hours of law clerk time, or a total of 35.7 hours of judge time.

The break-even point for the program is when 7.3 cases that otherwise would have gone on to oral argument are terminated. This assumes that the senior staff attorney is putting in 500 hours of work, the secretary, 375 hours of work. With different numbers, the break-even point would change. (These figures do not include time saved as a result of fewer motions being filed.)

Reduction of Brief Pages

On reduction of the number of brief pages, the preappeal program would be justified (assuming that judges and law clerks read briefs at 60 pages per hour on the average) if the program brought about a 2.2-page reduction in each case. Twenty minutes of senior staff attorney time plus 15 minutes of secretary time equals 26 minutes of senior staff attorney time or 10.4 minutes of judge time. Assuming that judges read at the rate of 60 pages per hour, there are 4.8 minutes of judge time involved in the reading of 1 page in a case. That 4.8 figure is composed of 4 minutes for the judges (1 minute for each of the 2 panel members and 2 minutes for the author) and 4 minutes for the law clerks (1 minute for each of 2 panel members' law clerks and 2 minutes for the authoring judge's law clerk.) The 4 minutes of law clerk time converts to 0.8 minutes of judge time. The 4.8 minutes of

judge reading time per page divides into 10.4 minutes of judge conference time to arrive at 2.2 pages per case as the policy-significance level. At 90 pages per hour, the level would be 3.3 pages per case. At 120 pages per hour, the level would be 3.4 pages per case.

Reduction of Routine Motions

As to reduction of routine motions, it is estimated that it takes a law clerk 5 minutes to handle a procedural motion and a deputy clerk 15 minutes to prepare and mail it. To justify the conferences, procedural motions would have to be reduced by 4.2 per conference case. Fifteen minutes of deputy clerk time converts to 7.5 minutes of law clerk time, which added to the 5 minutes of actual law clerk time equals 12.5 minutes of law clerk time or 2.5 minutes of judge time. The 10.4 minutes of judge conference time divided by 2.5 minutes of judge time for procedural motions is 4.2. A reduction of 4.2 procedural motions per case justifies the program.

Reduction of Nonroutine Motions

A nonroutine, or substantive, motion requires about 10 minutes of judge time, 30 minutes of law clerk time, and 20 minutes of deputy clerk time. The conferences are justified if there is a 0.6 reduction in substantive motions in conference cases. Twenty minutes of deputy clerk time converts to 10 minutes of law clerk time. This figure added to the 30 minutes of law clerk time equals 40 minutes, which converts to 8 minutes of judge time

plus the 10 minutes of actual judge time, for a total of 18 minutes. Eighteen minutes of judge time for substantive motions divided into 10.4 minutes of judge time for conferences yields a quotient of 0.6. A reduction of 0.6 substantive motions per case is significant.

Conclusion

In developing these criteria, another method of computing break-even points for terminations was initially considered. It was assumed that the court would require ten active judgeships to handle its business. It was also assumed that the senior staff attorney and secretary would devote two-thirds of their time to the conferences and that the cost of two-thirds of their time is equal to about one-third of the time of a judge and staff. Therefore, under such an analysis, the program would be justified if at least 3.3 percent of the conference cases were terminated without oral argument, because a savings of one-third of a judge-year from the court's capacity of ten judge-years is equivalent to saving 3.3 percent of the court's caseload over a year.

Judge Swygert's time in conference was not included in determining any of the criteria set forth above. If it had been, the figures would have been greatly affected. Assuming he spends about 12 minutes of his time on an average conference case, including his time in our computations slightly doubles the time cost of the conference. It increases from 10.4 to 22.4 minutes of judge time. Thus the break-even point for terminations be-

comes 16.4 cases; for brief-page reduction, 4.7 pages; for reduction of procedural motions, 9.0 motions per case; and for reduction of substantive motions, 1.3 per case.

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